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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 567

PAN-ATLANTIC STEAMSHIP CORPORATION,
Petitioner,

vs.

JAMES FYFE AND JOHN T. BAILEY, DOING BUSINESS AS UNITED FIBRE COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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JAMES FYFE AND JOHN T. BAILEY, DOING BUSINESS AS UNITED FIBRE COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Pan-Atlantic Steamship Corporation, petitioner, prays that a writ of certiorari be issued to review the decision of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case, which became final upon the denial of its petition for a rehearing on August 26, 1940 (R. 158).

Summary Statement of the Matters Involved.

This case involves nullification of three provisions of bills of lading in common usage by ocean carriers, and the interpretation of two Federal Maritime Statutes.

1. In June, 1937, the Barber-Wilhelmsen Line, hereinafter referred to as "Wilhelmsen", issued in the Philippine

Islands bills of lading to the libellants for two shipments of goods consisting of 500 bales of manila fiber and 67 coils of manila rope which shipments were later destroyed by fire in New York Harbor while being transported by the Manhattan Lighterage Corporation, an independent lighter carrier, from the initial carrier to the petitioner (Findings of Fact, 2, 11, 12, R. 122, 124, 125).

2. The bills of lading between the shippers and Wilhelmsen, the initial carrier, contained the following provisions which the District Court and the Circuit Court of Appeals held illegal and null and void as contrary to the Harter Act, 46 U. S. C. A. 190 (B. of L. R. 8-22, Exhibits 8, 9, R. 62; Conclusions of Law V, VI, VII, R. 128; C. C. A. opinion, R. 147).

> "11. (g) It is agreed that each of the Carriers shall be responsible only for the goods whilst same are in their own personal custody. The arrangements for through carriage are made for the convenience of shippers, and the responsibility of each Carrier with regard to the carriage and storage by other means than its own vessels or other vehicles or stores is to be that of forwarding agent only, and any claim for loss, damage or delay must be made only against the person or company in whose custody the goods actually were at the time when the loss, damage or delay was caused or arose" (R. 19).

> "11. (e) * * * The shipowner is not, and shall not be deemed to be the agent for such carrier or carriers nor shall the shipowner be liable in any respect whatever for any loss, damage, delay in regard to the goods after they shall have left the ship's deck and/or tackle where the ship's responsibility shall cease * * *" (R. 18).

> "4. That the master, owners, or agents of the vessel or its connections shall not be responsible for loss, damage, or injury arising from any of the following perils,

causes, or things, namely: * * * lighterage to or from the vessel, transshipment, landing, jettison, explosion, heat, fire, on board or on shore, at any time or in any place * * *; whether any of the perils, causes or things above mentioned, or the loss, damage, or injury arising therefrom be occasioned by or arise from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, workmen, or other persons in the service of the shipowners or their agents, whether in relation to the navigation, management, or stowage of any carrying vessel, or otherwise, and whether on board the said ship or any other ship belonging to, or chartered by, them, for whose acts they would otherwise be liable, or otherwise howsoever" (R. 13-14).

3. The said goods were delivered to Wilhelmsen at Philippine ports under bills of lading calling for shipment to Peoria, Ill., and St. Louis, Mo., via New York and New Orleans, La. (Findings of Fact 2, R. 122). Wilhelmsen, operating a line between Manila and New York, made no calls at Gulf ports. The petitioner, Pan-Atlantic Steamship Corporation, hereinafter referred to as "Pan-Atlantic", maintained a line from New York to the Gulf (Findings of Fact 6, R. 123).

4. On July 28, 1937, Wilhelmsen wrote Pan-Atlantic that the SS. "Tai Yin", one of their ships, would arrive in New York August 2, 1937, with said merchandise on board for shipment to New Orleans, saying,

> "* * * we would thank you to lodge orders with the Manhattan Lighterage Corp., covering transfer of the above mentioned cargo as soon as same is available" (R. 86, Exhibit 1, R. 44).

Pan-Atlantic accordingly placed an order with the Manhattan Lighterage Corporation, hereinafter referred to as "Lighterage Company," an independent carrier operating some 45 boats and having no connection with Pan-Atlantic

or Wilhelmsen, for the carriage of said merchandise (R. 59, 96, Exhibit 11, R. 53, R. 98, Exhibit 12, R. 54).

5. The Lighterage Company, thereafter, placed the merchandise on one of its boats, the lighter "Sydney", and carried same to the dock of Pan-Atlantic, tying up at said dock to await the arrival of the steamship that would carry the merchandise to New Orleans (Findings of Fact 10, R. 124). Before said steamship arrived and while the merchandise was still on the lighter "Sydney", a fire broke out on the lighter and seriously damaged said merchandise (Findings of Fact 11, R. 124), Pan-Atlantic never having given any receipt or issued any bill of lading for said merchandise and never received it into its possession or custody (R. 51, 72).

6. There was an understanding between the parties that shipments on through bills of lading from ports of call in China and Japan by Wilhelmsen and destined for Gulf ports be divided 60% to Wilhelmsen and 40% to the Pan-Atlantic Steamship Corporation, cost of transfer at New York being absorbed on the same basis (R. 104, Exhibit 16, R. 63). Pan-Atlantic had no standing agreement with the Manhattan Lighterage Corporation under which the Lighterage Company acted for them in transporting cargoes in New York Harbor, nor did it use the Lighterage Company exclusively in transporting cargoes (R. 56, 58, 59).

7. On February 27, 1937, the Lighterage Company quoted rates to Pan-Atlantic with respect to any services they might perform for it (R. 102, Exhibit 14, R. 57) and this rate-quotation letter was erroneously interpreted as an "agency agreement" between Pan-Atlantic and the Lighterage Company by the District Court (Findings of Fact 8, Conclusions of Law I, R. 124, 127) and the Circuit Court of Appeals followed the lower court (R. 148-149).

8. Libellants (shippers) brought suit against Wilhelmsen, Pan-Atlantic, the Lighterage Company and the latter's lighter "Sydney." Wilhelmsen's motion to dismiss the libel as to it was sustained and the libellants did not thereafter appeal or move to amend their libel (R. 1). The District Court (Goddard, D. J.), in dismissing the libel, stated in the course of its opinion as follows:

> "The Manhattan Lighterage Company was a connecting carrier and the initial carrier is not liable for the negligence of a connecting carrier in view of the provisions of the contract of carriage in the case at bar, Oregon-Washington R. R. Navigation Co. *v.* McGinn, 258 U. S. 409" (R. 26).

9. Thereafter, the Lighterage Company and the "Sydney" were discharged under the Fire Statute, 46 U. S. C. A. 182 (R. 2). The action then proceeded against Pan-Atlantic alone and resulted in an interlocutory decree in favor of the libellants, with an order of reference for the ascertainment of the amount of the damages (R. 138-140).

10. At the trial, the respondent, Pan-Atlantic, urged as its principal defenses that, under provisions 11(g) and (e) of the bills of lading (set out, *supra*, pp. 2 & 3), fixing the liabilities of the various carriers, it was not liable for the loss because it had not received said goods into its possession or custody at the time of the loss and the goods were damaged by fire while in the possession of an independent carrier, and as another defense that, under the Fire Statute, 46 U. S. C. A. 182, and paragraph 4 of the bills of lading (set out, *supra*, pp. 2-3), respondent was not liable.

11. The District Court and the Circuit Court of Appeals, however, declared illegal and null and void the three above

mentioned provisions of the bills of lading and held that the Fire Statute, while exonerating the Manhattan Lighterage Corporation, did not relieve from liability the respondent, because it concluded, as matter of law, that the Lighterage Company was the agent of the respondent, and although the agent was exonerated, the principal could be held liable.

12. The Circuit Court of Appeals admitted doubt as to the soundness of its position in overruling petitioner's defenses, saying:

> "Respondent makes the plausible argument that, since Manhattan, its agent, cannot be held responsible because of the Fire Statute, Pan-Atlantic, as principal, must also be exonerated on settled principles of agency law. It is quite true that a principal may not be liable if his agent is free from fault, but there are many instances where the agent has committed an unlawful act and yet is immune from responsibility" (R. 151-152).

In reference to paragraph 4 of the bill of lading, it stated petitioner's contention, saying:

> "Respondent also relies on an express provision in the bill of lading, whereby the main carriers exempted themselves from liability for damage caused by fire, in lighters or other craft, due to the negligence of the lighter's crew. If this provision is valid, Pan-Atlantic is, of course, relieved from responsibility." (R. 152.)

Questions Presented.

1. Whether the Circuit Court of Appeals has decided a Federal question in conflict with applicable decisions of this Court, namely, *Oregon-Washington Co.* v. *McGinn*, 258 U. S. 409; *Galveston Wharf Co., et al.* v. *Galveston, H. & S. A. R. Co.*, 285 U. S. 127; and *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122.

2. Whether the Circuit Court of Appeals has decided important questions under the *Fire Statute*, 46 U. S. C. A. 182, and the *Harter Act*, 46 U. S. C. A. 190, that have not been, but should be, settled by this Court.

3. Whether the Circuit Court of Appeals has rendered a decision in conflict with the rule of the Fifth Circuit Court of Appeals in *Inland Waterways Corp.* v. *Standard Commercial Tobacco Co.*, 65 F. (2d) 715.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals is of far reaching importance in that it has declared illegal, null and void three clauses of the bill of lading as contrary to the provision of the Harter Act, notwithstanding that these provisions have been long used by ocean carriers, and have either been sustained by this Court or have not been passed upon by it, and has left the shipping industry in a state of confusion and uncertainty.

2. The decision below construes the Fire Statute in a way never before interpreted by any court, holding where a lighterage company, which was found as a matter of law to be on-carrier's agent, was exonerated from liability for damage to a cargo resulting from the negligence of the crew of the lighter, the law and the bill of lading would not exonerate the principal, a shipowner engaged in foreign commerce, expressly exempted from such liability by the contract of the parties.

3. The decision below has construed a plain rate-quotation letter between Pan-Atlantic and the Lighterage Company as a contract making the Lighterage Company the agent of Pan-Atlantic and thereby creating rights and obligations between them never contemplated by them or

sustained by the decision of any Court and which made them liable for a risk never contemplated.

4. A reading of the 14 headnotes in the reported decision of this case, *Fyfe* v. *Pan-Atlantic S. S. Corp.*, 114 F. (2d) 72, discloses the novel and important questions to shippers in foreign commerce, raised by this case.

Conclusion.

Petitioner is entitled to a writ of certiorari addressed to the United States Circuit Court of Appeals for the Second Circuit, to review and reverse the decision in this case.

Respectfully submitted,

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